INTERNATIONAL AGREEMENTS AND STATUS OF FORCES AGREEMENTS

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OVERVIEW

- References/Definitions
- International Agreements Generally
- SOFA Types
- SOFA Contents
- Beware!

REFERENCES

- 1 U.S.C. SEC. 112b (“CASE-ZABLOCKI ACT”)
- DEPARTMENT OF STATE CIRCULAR 175
- DODD 5530.3, 11 JUNE 1987
- AFI 51-701, 6 MAY 1994
- See also, ***The Making of Executive Agreements, Boston University International Law Journal, Volume 13, Spring 1995, Number 1, by Dr. Richard J. Erickson***

DEFINITIONS

- ***Status of Forces Agreement (SOFA):***

  "Any type of ***binding*** international agreement which seeks to order and arrange the competing ***legal*** and ***jurisdictional*** claims of ***receiving*** and ***sending*** states"

DEFINITIONS

- ***Receiving State*:**
  - The state which ***hosts*** foreign armed forces within its territory
- ***Sending State*:**
  - The state which ***dispatches*** its armed forces ***overseas*** to the territory of the receiving state

INTERNATIONAL AGREEMENTS

- Under International Law
  - Written or Oral
  - Any Intent to Bind Sufficient
  - Reservations Sometimes Authorized
  - Stages: Negotiation, Signature, Ratification, Entry into force

INTERNATIONAL AGREEMENTS: WHAT'S IN A NAME?

- International agreements take on various names and titles
  - Treaties, memoranda of understanding, memoranda of agreement, exchange of notes, exchange of letters, technical agreements, protocols, notes verbal, aides memoir, agreed minutes, statements of intent, statements of understanding, etc.

INTERNATIONAL AGREEMENTS IN INTERNATIONAL LAW

- International law makes ***no legal distinction*** between agreements based on ***form***
- The ***only issue*** in international law is whether the parties ***intended*** to enter into a ***legally binding*** agreement
  - (Article 38, Statutes of the International Court of Justice)

INTERNATIONAL AGREEMENTS IN DOMESTIC LAW

- In most countries, the ***form/title*** of an agreement makes a difference in so far as its own ***domestic*** law
- A nation's Constitution, laws and regulations generally govern:
  - The ***concluding*** of an agreement
  - The ***implementation*** of an agreement
  - The ***legal effect*** of an agreement

CONCLUDING AGREEMENTS: THE U.S. MODEL

- A ***treaty*** (e.g. NATO SOFA) must receive the ***advice and consent*** of the U.S. Senate ***before*** it can be ratified or acceded to by the President
- All other agreements are considered ***"executive agreements"*** and do ***not*** require U.S. Senate action

IMPLEMENTING INT'L AGREEMENTS: THE U.S. MODEL

- Circular No. 175 Process:
  - Essentially a ***State Department-owned*** process
  - DoD is basically a ***"customer"***
    - i.e., sends up its customer requirements
  - Requires ***formal legal review*** to insure that our international obligations are properly undertaken
    - In a manner that they can and will be ***fully and faithfully performed***

LEGAL EFFECT OF INT'L AGREEMENTS

- Under international law, international agreements are to be performed in ***good faith***
- Domestic law requirements ***cannot*** serve as a legal justification in international law for a country's failure to perform an international obligation
  - All ratified treaties shall be the supreme Law of the Land; US Constitution, Art. VI, Clause 2

WHY SOFAs?

- No well-established customary ***international law*** regarding the status of foreign military forces ***invited*** into another state's territory to conduct ***authorized*** military activities
- Need to ***balance the interests*** of receiving and sending states
  - Generally, in the areas of ***criminal and civil jurisdiction*** and ***fiscal*** matters

WHY SOFAs? (cont.)

- All SOFAs are ***legally binding*** international agreements that create a ***legal status*** that, absent the agreement, would not otherwise exist
- SOFAs, as international agreements, can be ***purposely fashioned*** by the parties to meet the needs of their ***military*** and ***political*** relationship

WHY SOFAs? (cont.)

- The “New World Disorder”
  - New Nations/Internal Wars/New Alliances
- New Partners & Coalitions = New Sofas Or Expand Old
- Non-traditional Military Roles
  - Combat, Peacekeeping, Counter-terrorism, HCA, NEO

WHY SOFAs? (cont.)

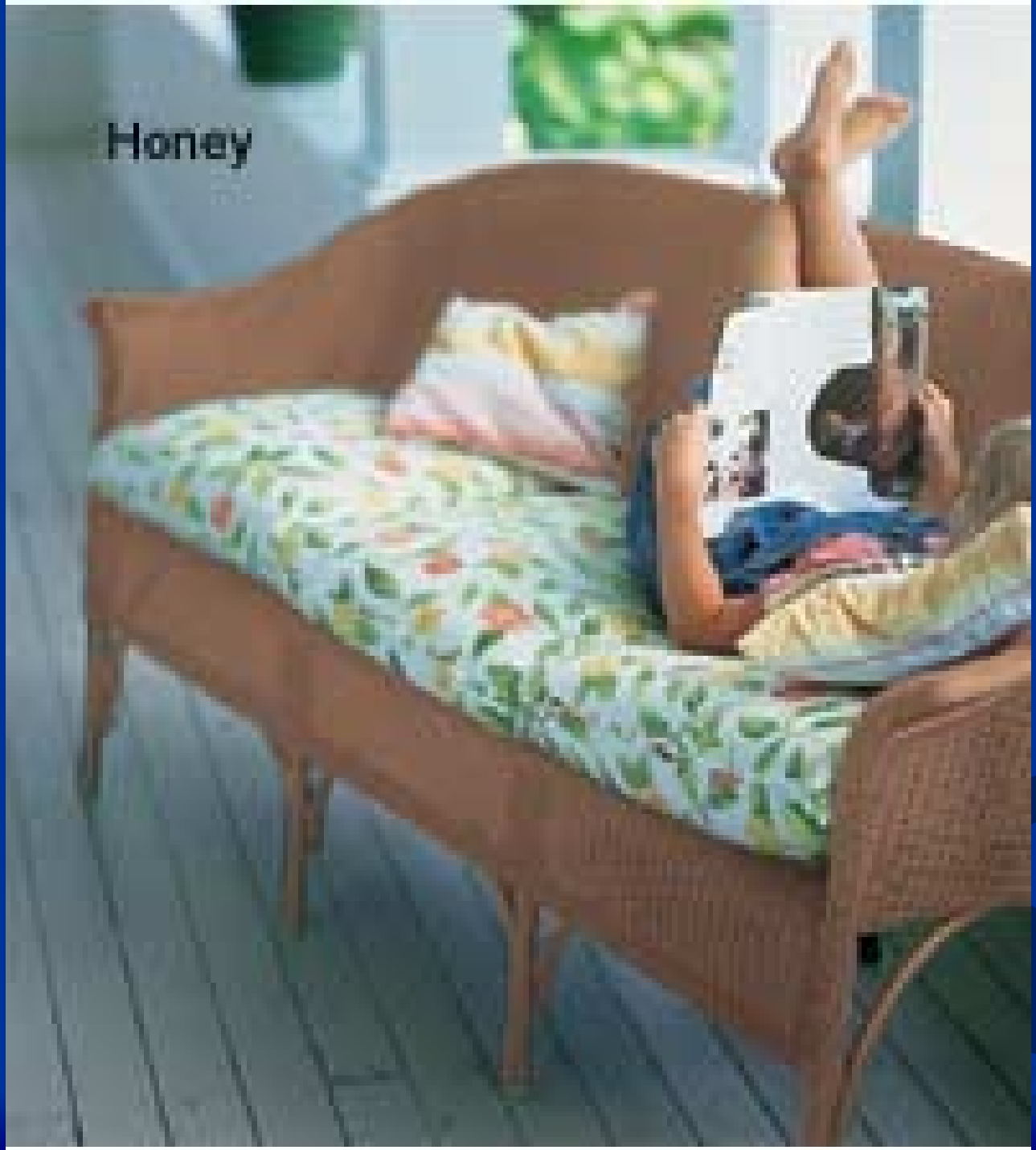
- If one is tall, one simply can’t stretch out comfortably on a loveseat

TYPES OF SOFAs: IN GENERAL

- Multilateral or Bilateral
  - NATO
  - Saudi Arabia
- NATO SOFA (1951); Partnership for Peace SOFA (1995); Japan SOFA (1960); Korea SOFA (1966)

TYPES OF SOFAs: IN GENERAL

- SOFAs are generally divided into 3 types:
  - Administrative and Technical Staff (A&T)
    - via exchange of diplomatic notes
  - Mini-SOFAs
  - Full SOFAs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TYPES OF SOFAs: IN GENERAL

- The type of SOFA selected is primarily a ***political decision***
  - Primarily the product of the ***maturity*** of the political and defense relations of the sending and receiving states
  - Also a function of the nature and character of the ***anticipated military activity***

TYPES OF SOFAs: IN GENERAL

- The ***duration*** of a SOFA is also a ***political*** decision…***permanent vs. temporary***
  - Indefinite, fixed term of years, or limited duration
  - Again, tied to the nature of the military operations/exercise and a function of the political/military relations of the states
- As of Oct 01, the U.S. has permanent SOFAs of varying types with 108 countries

ADMINISTRATIVE AND TECHNICAL STAFF [A&T]

- Accomplished through an ***exchange of diplomatic notes***
  - Extends A&T status to the military of the sending state under the Vienna Convention on Diplomatic Privileges and Immunities
  - Confers ***complete immunity*** from receiving state criminal jurisdiction and ***limited immunity*** from receiving state civil jurisdiction from acts arising from official duty conduct

ADMINISTRATIVE AND TECHNICAL STAFF [A&T] (cont.)

- Often executed at MAJCOM or Unified Command level, in concert w/ U.S. Embassy
- Often used for ***ad hoc*** military activities
  - Humanitarian relief efforts
  - Duration varies, but ***usually short term***
- In some A&T notes, ***additional clauses may be added*** (e.g. tax relief, import/export, firearms)

MINI-SOFAs

- Usually negotiated and concluded as ***formal*** international agreements
  - Normally signed by each government, rather than by exchange of diplomatic notes via respective embassies
- However, ***treated as executive agreements, not treaties***
- Normally, of longer duration than A&T status

MINI-SOFAs (cont.)

- Usually ***broader than A&T status***, but ***less comprehensive than a full SOFA***
  - Includes the same topics as A&T status, plus:
    - Passport/Visa
    - Driver's licenses and registration
    - Criminal/civil jurisdiction
    - Claims
    - Procurement
    - Customs
    - Duration and Termination

FULL SOFAs

- Negotiated and concluded as an international agreement which is executed by each government
  - NATO SOFA is actually afforded treaty status
  - Other SOFAs are merely executive international agreements
- Can be ***multi-lateral*** (NATO SOFA) or ***bilateral***
- More expansive/broader than Mini-SOFAs

FULL SOFAs (cont.)

- Generally, Full SOFAs:
  - ***Permanent*** in nature
  - Reflect ***mature relationships*** between the parties
  - Anticipate ***continued future*** military activities
  - Incorporates basic ***fundamental principles*** and promotes the ***common interests*** of both the sending and receiving states

CONTENTS OF FULL SOFAs: OVERVIEW

- Definitions
- Respect for law and sovereignty
- Entry and departure procedures
- Wearing of the uniform
- Carrying of firearms
- Driving licenses/vehicle registration
- Criminal jurisdiction

CONTENTS OF FULL SOFAs: OVERVIEW (cont.)

- Civil jurisdiction
- Arrest and service of process
- Claims
- Duties and taxes
- Personal property: importation/use/exemption
- Personal tax exemption
- Morale, Welfare & Recreation

CONTENTS OF FULL SOFAs: OVERVIEW (cont.)

- Health care
- Postal services
- Use of currency & banking facilities
- Contractor and contractor employees
- Local procurement/use of local labor
- Customs
- Governing agreement/duration & termination

CONTENTS OF FULL SOFAs: IN DETAIL

- ***Respect for law and sovereignty***
  - Duty to respect receiving state's law/sovereignty
  - Imposed on sending state
  - Duty to abstain from any political activity
  - Sending state agrees to take all measures within its authority to insure compliance

CONTENTS OF FULL SOFAs: IN DETAIL

- ***Entry and departure procedures***
  - Members of the force exempted from passport and visa requirements (I.D. card and orders)
  - Crews of visiting ships and aircraft: I.D. card only
  - Civilian component/dependents may require passports but exempt from visa/multiple visa requirement
  - Other topics may include extent of immigration/emigration inspections, exemption from work permit requirements, and procedures to retire or separate in the host country

CONTENTS OF FULL SOFAs: IN DETAIL

- ***Wearing of the uniform***
  - When and where permitted
  - Application of U.S. law and service instructions
  - On/off facility and on/off duty distinctions
  - Type of uniform
- ***Carrying of firearms***
  - Same considerations as above

CONTENTS OF FULL SOFAs: IN DETAIL

- ***Driving licenses/vehicle registrations***
  - Only U.S. military license required to operate U.S. GOV
  - No local registration/licensing fee for U.S. GOV
    - However, U.S. must distinctly mark all GOVs
  - Acceptance of U.S. licenses for operation of POVs
  - Local registration of POVs, without payment of fees

CONTENTS OF FULL SOFAs: IN DETAIL

- ***Foreign Criminal jurisdiction***
  - Exclusive and concurrent jurisdiction sharing
    - Note: A&T status is exclusive sending state's jurisdiction

CONTENTS OF FULL SOFAs: IN DETAIL

- ***Civil jurisdiction***
  - Individual immunity for matters arising out of the performance of official duties
    - Civil recourse, if any, only against U.S. government
    - NOTE: generally the US will not waive its defense of sovereign immunity
  - In situations involving conduct of other than official duty, individual members of the sending force may be subjected to receiving state's civil process

CONTENTS OF FULL SOFAs: IN DETAIL

- ***Claims***
  - Normally, government-to-government claims are waived
  - SOFAs generally impose a formula for the adjudication and payment of all other claims (except contractual or combat related)
    - Those caused by act/omission of U.S. personnel
    - Either U.S. adjudicates and U.S. pays in full or receiving state adjudicates and payment is cost-shared
  - Possible U.S. ex gratia claims

CONTENTS OF FULL SOFAs: IN DETAIL

- ***Duties, taxes and other charges***
  - Importation, exportation and local purchase exemptions for U.S. material, equipment, supplies, provisions, and other property (also applies for a contractor acting by or on behalf of the US)
    - Applies to both government and individual property
  - Also, procedures/prohibitions for transfer of personal property to foreign nationals
  - Exemption from aircraft overflight, navigation, and landing fees

CONTENTS OF FULL SOFAs: IN DETAIL

- ***Exemption from personal income tax***
- ***Health care: access to receiving state's medical facilities and regulation of U.S.-provided medical care***
- ***Authorization to establish U.S. postal services under U.S. domestic law/regs***
- ***Procedures for the host country to inspect private mail (not first class)***

CONTENTS OF FULL SOFAs: IN DETAIL

- ***Relaxation of currency control restrictions and permission for military banks to convert currency (Military Banks authorized to provide full range of banking services)***
- ***Local procurement: commitment by sending state to maximize use of local contractors…competitive bids***

CONTENTS OF FULL SOFAs: IN DETAIL

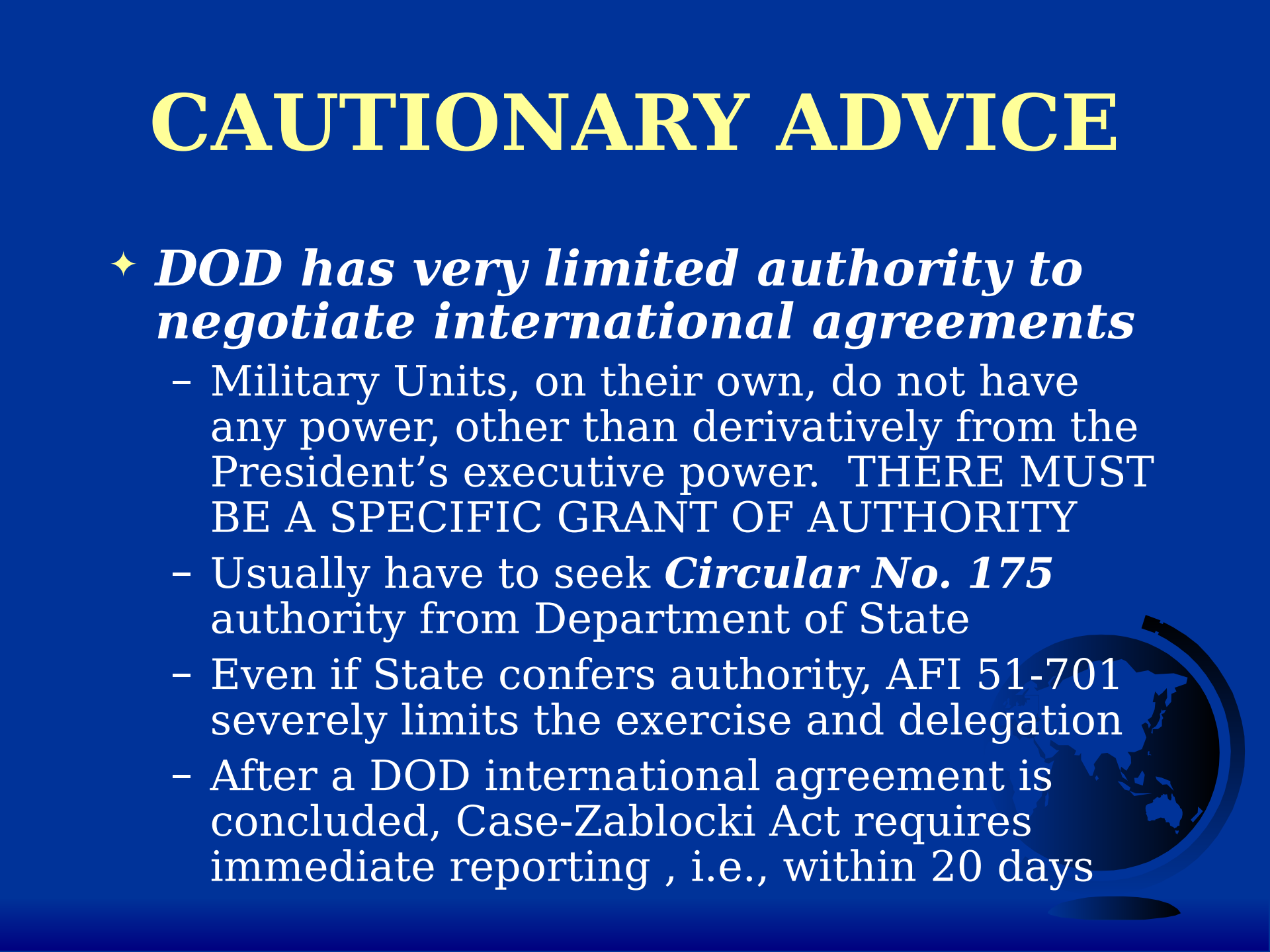
- ***Utilization of local labor… negotiability of local labor laws, rules, regs, etc.***
- ***Governing agreement…preserves and/or allows for mod of prior agreements***
- ***Duration and termination…utilizes basic and generally accepted constructs of contract and international law***

CAUTIONARY ADVICE

- ***Prohibits "maverick" negotiations by unauthorized persons and agencies***
  - **"AF personnel will not make any unilateral commitment to any foreign government (either orally or in writing) …nor sign an international agreement, before obtaining the concurrence of SAF/GCI…its designee…or the appropriate staff judge advocate" AFI 51-701**

CAUTIONARY ADVICE

- ***DOD has very limited authority to negotiate international agreements***
  - Military Units, on their own, do not have any power, other than derivatively from the President's executive power. THERE MUST BE A SPECIFIC GRANT OF AUTHORITY
  - Usually have to seek ***Circular No. 175*** authority from Department of State
  - Even if State confers authority, AFI 51-701 severely limits the exercise and delegation
  - After a DOD international agreement is concluded, Case-Zablocki Act requires immediate reporting , i.e., within 20 days



CAUTIONARY ADVICE

- ***Negotiation Can Be Construed to Convey Binding Offer***
  - Commanders may be seen as Having Authority even if they Don't ("Maverick Negotiation")
  - Words/Deeds Could Be Taken As Binding Offer by Other Governments or Agents
- **Bottom Line: DoD Personnel Should Do Nothing That Might be Misconstrued as Negotiation Unless They Have Advance Authority**

REAL WORLD REALITIES

- ***Does the U.S. have an existing agreement with the country***
  - ***http://www.afjai.hq.af.mil/ilaw/default.htm***
  - ***https://www.jagcnet.army.mil/CLAMO-IA***
  - ***http://www.state.gov/www/global/legal_affairs/tifindex.html***
  - ***http://www.state.gov/www/regions/country_offices.html***
  - ***http://www.state.gov/www/about_state/contacts/key_officers99.html***
- ***Even with a written agreement, the sea port workers or officials at the airport may not know or accept it– contact U.S. military liaison in the country***

SUMMARY

- References/Definitions
- International Agreements Generally
- SOFA Types
- SOFA Contents
- Concerns

QUESTIONS?